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NO. 83-434

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FRANK FOOLS CROW, ETC., ET AL.,
Petitioners,

v.

TONY GULLET, ETC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

# RESPONDENTS' BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

On or about the 20th of May, 1982, the Petitioners brought this action for declaratory and injunctive relief, and for damages

contending that the State of South Dakota in operating and developing Bear Butte State Park had violated the Free Exercise of Religion Clause of the First Amendment of the United States Constitution.

The Petitioners requested the Federal District Court to declare Petitioners' rights to full, unrestricted and uninterrupted religious use of Bear Butte State Park. Additionally, Petitioners sought an injunction precluding the State from restricting or regulating their access to and use of Bear Butte State Park. Furthermore, Petitioners sought an injunction, not only to stop any new construction projects on the Butte, but also to direct the State to remove all present roads, parking lots, and buildings currently in place at the park. Finally, the Petitioners request over one million dollars in damages for alleged deprivation of their

civil rights under 42 U.S.C. § 1983. JA 10-11.[1]

Bear Butte is a geological laccolith which stands in striking solitude on the plains of South Dakota near the northeast edge of the Black Hills.[2] The Butte has immense cultural, historical, and geological importance to all people; both Indian and non-Indian. Bear Butte was purchased by the State of South Dakota in 1962, and subsequently designated and established as a State Park in perpetuity by the South Dakota Legislature. JA 150. As Lowen Schuett, Director of the Division of Parks and Recreation for

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1 JA refers to the Joint Appendix of the parties on appeal to the Eighth Circuit, which includes the pleadings and transcript of the June 18, 1982, hearing in Federal District Court on Plaintiffs (Petitioners here) request for a Preliminary Injunction.

2 Bear Butte is a similar geological formation to Devil's Tower in Wyoming, but time has not yet eroded all of the soil around Bear Butte.

the State of South Dakota established at the Federal Evidentiary Hearing, "State Parks are for the purpose of preserving and protecting unique and natural historic, geologic features of the State, and also providing opportunities for the public to participate in recreational activities." JA 151. He continued by testifying that, "The purpose of Bear Butte State Park is to preserve the unique, historical and geological aspect of the Butte, plus provide the public an opportunity to learn about the historical and cultural features which are associated with the Butte, and perhaps a third objective of giving the public an opportunity to hike trails and participate in some limited picnicking opportunities." JA 151-152.

After purchasing the property in 1962, the State of South Dakota in 1967, constructed, adjacent to the south slope, a Visitor's Center along with a main access

road to that Visitor's Center. JA 161. In addition the State has constructed a parking lot which serves the Visitor's Center; another parking lot that serves a trail head contact station; a residence for the park manager and park shop located a little south of the Visitor's Center. JA 171.

Apparently, this present action was brought by the Petitioners when the State started several new construction projects at the Butte. In 1982, the State of South Dakota determined that several improvements were necessary to better facilitate the use of Bear Butte State Park. To accomplish this the State entered into several construction contracts to:

1. Move the park shop from its present location down further south of the Visitor's Center so that it would not disrupt the scenic view of Bear Butte from the Visitor's Center;

2. Build a new access road to the park shop's new location;

3. Build an access road and parking lot for the ceremonial worshipers adjacent to the area they have historically used to conduct their religious practices; and

4. Repair and blacktop the existing main road into Bear Butte State Park.

The most controversial construction project was the access road and parking lot adjacent to the ceremonial use area. The gravel spur road constructed by the State replaces a dirt trail used by the Petitioners to get down to the area where they have traditionally camped with their cars and vans. The new road gives the Petitioners all-weather access into the traditionally ceremonial use area and prevents the Petitioners' vehicles from tearing up the meadow when it rains. JA 135, 158, 161, 174. Furthermore, the parking lot occupies the exact same area used by past ceremonial worshipers to park their automobiles and does

not occupy any of the area utilized for the ceremonial religious activity itself. JA 46, 135. Finally, many of the ceremonial users themselves requested an all-weather access into the area prior to the State's construction. JA 174, 198.

## ARGUMENTS

### I

### THE PETITIONERS FAILED TO ESTABLISH ANY INFRINGEMENT OF A CONSTITUTIONALLY COGNIZABLE FIRST AMENDMENT RIGHT.

Whether or not the State of South Dakota has infringed on the Petitioners constitutional right of free exercise of religion is a factual question. Both the Federal District Court of the Western Division of South Dakota, and the Eighth Circuit Court of Appeals have found that the State's activities at Bear Butte State Park have not interferred or infringed upon the Petitioners religious freedom. It is a well established

rule that this Court does not grant certiorari to review evidence and discuss specific facts, (United States v. Johnson, 268 U.S. 220, 227 (1925)), and has often held that "a court of law, such as this Court is, rather than a court for correction of errors in fact findings, cannot undertake to review concurrent findings of facts by two courts below in the absence of a very obvious and exceptional showing of error." Graver Tank and Mfg. Co. v. Linde Air Products Co., 337 U.S. 910 (1949). Such error does not exist in this case.

The State of South Dakota has not managed Bear Butte to disrupt or to exhibit the Petitioners religious activities at the Butte; but has managed the Butte for the benefit of all of the citizens of the State of South Dakota, and has made a conscious attempt to balance, Petitioners privacy and

religious freedom, with the other legitimate and important uses of Bear Butte State Park. JA 153.

II

DOES FREE REGISTRATION RESTRICT THE PETITIONERS CONSTITUTIONAL RIGHT OF FREE EXERCISE OF RELIGION.

The State of South Dakota requires Petitioners to register and receive a permit before they are allowed to camp overnight in the religious ceremonial use area. Petitioners erroneously believe that this registration scheme requires them to receive a permit each and every time they go upon the Butte to pray, and they feel that this registration and permitting process is a violation of their religious freedom. The Petitioners fail to realize that their registration and permit is not imposed on the Petitioners to enter Bear Butte, and conduct their religious activities, but the registration and permit is required for overnight camping.

The free registration and permit process serves two purposes for the State of South Dakota:

> (1) It provides park personnel with a means to contact ceremonial worshipers in the case of an emergency (JA 126) and;
>
> (2) The traditional ceremonial use area is closed to the general public for recreational camping. Overnight camping in the traditional use area is only allowed as it is necessary for those individuals and their supporters to conduct their ceremonial religious practices. By requiring and issuing a permit to ceremonial religious users for overnight camping in the restricted area, park personnel are able to prevent general recreational overnight campers from using the site free, unlike the "official" campground located at Bear Butte State Park Lake which has a fee. Only authorized ceremonial users, with permits are allowed in the restricted area.

JA 155.

III

ALL THE COURTS OF APPEALS WHICH HAVE RENDERED A DECISION ON THE SAME MATTER ARE IN CONCURRENCE WITH THE EIGHTH CIRCUIT COURT OF APPEALS HOLDING IN THIS PRESENT CASE.

Three United States Court of Appeals have considered free exercise claims seeking to restrict developments of government lands. Those courts include the Tenth Circuit Court of Appeals in Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981); the United States Court of Appeals for the District of Columbia in Hopi Tribe, et al. v. Block, et al., No. 81-1912, 81-1905, filed (D.C. Cir. May 20, 1983)[3], and the Eighth Circuit Court of Appeals in this present case, [Fools] Crow, et al. v. Gullet, et al., (8th Cir. filed May 10, 1983). All three Court of Appeals

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[3] Published in 10 Indian Law Report, page 2132, August, 1983.

concur in their holding that governments cannot be compelled to operate public property primarily as a religious shrine to satisfy a certain group of individuals particular religious interest.

As the Tenth Circuit Court of Appeals stated so succinctly in Badoni v. Higginson, supra, at 178:

> We are mindful of the difficulties facing Plaintiffs in performing sound religious ceremonies in the area frequented by tourists. What the Plaintiffs seek in the name of Free Exercise Clause is affirmative action by the government which implicates the establishment clause of the First Amendment. They seek government action to exclude others from the monument, at least for short periods, and to control the tourist behavior.
>
> Unquestionably the government has a strong interest in assuring public access to this natural wonder.

The Tenth Circuit continues by quoting from the learned Justice Hand:

> 'The First Amendment protects one against actions by the government,

> though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromise necessary in communal life.' [Citation omitted.]

The Petitioners simply have not demonstrated that the development or operation of the government property in question will prevent them from engaging in their religious practices or beliefs. Consequently, this Court should decline to review this case.

CONCLUSION

Petitioners have failed to show that the Eighth Circuit Court of Appeals decision in this above-entitled matter is in conflict with other decisions of the Court of Appeals or with opinions of this Court. Neither have the Petitioners shown that the factual issues

raised by this case are sufficiently important for this Court to exercise its extraordinary jurisdiction. For the foregoing reasons, the State requests this Court to deny Petitioners' request for certiorari.

Respectfully submitted,

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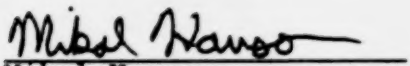

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